

<b>Yang v State of New York</b>
2007 NY Slip Op 34531(U)
July 11, 2007
Court of Claims
Docket Number: 106513
Judge: Nicholas V. Midey
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**FILED**  
JUL 30 2007  
STATE COURT OF CLAIMS  
ALBANY, NY

**STATE OF NEW YORK COURT OF CLAIMS**

**SANG NENG YANG,**

**Claimant,**

**DECISION AND ORDER**

**-v-**

**THE STATE OF NEW YORK,**

**Claim No. 106513  
Motion No. M-72749**

**Defendant.**

**BEFORE: HON. NICHOLAS V. MIDEY JR.  
Judge of the Court of Claims**

**APPEARANCES: For Claimant:  
SUE H. R. ADLER, ESQ.**

**For Defendant:  
HON. ANDREW M. CUOMO  
Attorney General  
BY: Maureen A. MacPherson, Esq.,  
Assistant Attorney General  
Of Counsel.**

Claimant has brought this motion seeking an order compelling the defendant to produce certain policies and directives from the Department of Correctional Services, as well as for an order compelling the defendant to produce certain individuals for depositions.

The following papers were considered by the Court in connection with this motion:

Notice of Motion, Affirmation, with Exhibits .....	1,2
Memorandum of Law in Support .....	3
Affirmation in Opposition, with Exhibits .....	4

Memorandum of Law (in Opposition) ..... 5

Reply Affirmation, with Exhibits ..... 6

Correspondence from Assistant Attorney General Maureen A. MacPherson, Esq. dated March 23, 2007 ..... 7

Correspondence from Sue H. R. Adler, Esq., claimant’s attorney, dated March 27, 2007..8

In this claim, claimant seeks damages based upon allegations of dental malpractice and negligence, occurring while he was incarcerated at various State correctional facilities.

After issue was joined, this Court issued a scheduling order, based upon a stipulation of counsel, providing dates for the completion of discovery and the service and filing of a note of issue and certificate of readiness. Due to complications and delays occurring during the discovery stages of this action, the dates set forth in this stipulation and order were subsequently extended by this Court on numerous occasions. Pursuant to a conference with counsel on May 16, 2006, the Court issued its most current scheduling order, directing that discovery be completed by November 1, 2006 and that a note of issue be served and filed by January 2, 2007.

During this period, claimant’s counsel requested a further conference with the Court regarding ongoing discovery disputes. During several telephone conferences with this Court’s law clerk and respective counsel, it became apparent that the disputes could not be resolved without formal Court intervention. Accordingly, pursuant to §206.8(b) of the Uniform Rules for the Court of Claims, claimant was granted permission to institute the instant motion, which was duly served and filed.

Within days of serving and filing her motion, however, claimant’s counsel inexplicably served and filed a note of issue and certificate of readiness. On the certificate of readiness,

claimant's counsel indicated that all discovery proceedings were completed, but included the following notation: "claimant's motion to compel pending, by leave of court". The Court is troubled by the service and filing of this note of issue, as claimant's counsel was acutely aware that discovery had not in fact been completed, as evidenced by the instant motion to compel discovery.

Furthermore, as indicated by defendant's counsel in her memorandum of law submitted in opposition to this motion (see Item 5), the filing of a note of issue has been held to render any previously filed motion to compel a nullity, as well as operating as a waiver of any outstanding discovery (Siragusa v Teal's Exp., Inc., 96 AD2d 749).

Nevertheless, it is apparent from the papers and correspondence submitted on this motion that claimant did not intend to waive the discovery sought by this motion, as indicated by counsel's notation on the certificate of readiness. However, the requested discovery in this Court's opinion, does not constitute unusual or extraordinary circumstances that would justify this Court in directing post-note of issue discovery. Accordingly, before addressing the merits of the instant motion, and as part of its order herein, this Court, *sua sponte*, directs the Clerk of the Court to strike the note of issue and certificate of readiness previously filed in this claim.

Turning now to the merits of this motion, claimant seeks the production of dental policies, directives and/or rules from the Department of Correctional Services, including consent forms for dental surgery, which were in effect during claimant's incarceration from June 2, 1999 through early 2003. Claimant's attorney acknowledges that defendant has produced a dental policy from the Department of Correctional Services which took effect on March 6, 2000.

Since this claim includes allegations that defendant violated its policies, directives and/or rules in providing dental treatment and services to claimant, claimant is certainly entitled to those

policies, directives and/or rules which were in effect during the course of such dental treatment while claimant was incarcerated.

Accordingly, defendant is directed to provide copies of the policies, directives and/or rules of the Department of Correctional Services pertaining to its dental practices, including any consent forms if such were in existence, for the period of claimant's incarceration from June 2, 1999 through January 2003. If there were no such policies, directives and/or rules in effect at anytime during this period, defendant shall produce a statement to this effect from a knowledgeable person within the Department of Correctional Services.

In this motion, claimant also seeks an order compelling the deposition of one Nursadies Mohan, an employee of the Department of Correctional Services who allegedly performed claimant's intake dental examination. From the papers submitted in opposition to this motion, it does not appear to the Court that defendant at anytime has opposed this deposition request, but for one reason or another it has never been scheduled. Accordingly, this Court hereby directs that the defendant produce Nursadies Mohan for a deposition at a time and place to be agreed upon by counsel.

Finally, claimant has also requested that this Court order the defendant to produce for deposition the Director of Dental Services for the Department of Correctional Services. Claimant's attorney, however, has made no representations that the Director of Dental Services has any personal knowledge of the facts forming the basis of this claim. Rather, it appears that claimant seeks to depose the Director regarding the dental policies, directives and/or rules of the Department of Correctional Services. Since this Court has previously directed that such policies, directives and/or rules be provided to claimant, and since there are no representations that the Director of Dental

Services has any personal knowledge or involvement in this claim, defendant need not produce the Director for a deposition.

Therefore, based upon the foregoing, it is

ORDERED, that the Clerk of the Court of Claims is hereby directed to strike the note of issue and certificate of readiness previously filed in this claim; and it is further

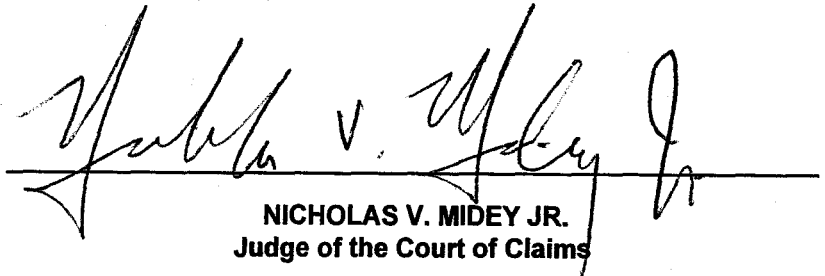
ORDERED, that defendant shall produce copies of the policies, directives and/or rules, including any appropriate consent forms, of the Department of Correctional Services in effect during the period of June 2, 1999 through January 2003, pertaining to dental services and dental surgery for inmates; defendant shall produce such documents (or a statement from a knowledgeable person within the Department of Correctional Services that such documents do not exist) within 45 days from the date of filing of this decision and order; and it is further

ORDERED, that defendant shall produce Nursadies Mohan for a deposition, at a time and place to be agreed upon by counsel for the parties, within 60 days from the date of filing of this decision and order; and it is further

ORDERED, that claimant's request for an order compelling a deposition from the Director of Dental Services for the Department of Correctional Services is hereby denied; and it is further

ORDERED, that upon completion of the discovery and deposition directed by this decision and order, claimant shall serve and file a note of issue and certificate of readiness by October 31, 2007. No further extensions shall be granted.

Syracuse, New York  
July 11, 2007

A handwritten signature in black ink, appearing to read "Nicholas V. Midey Jr.", is written over a horizontal line. The signature is cursive and somewhat stylized.

NICHOLAS V. MIDEY JR.  
Judge of the Court of Claims